Supreme Court, U.S.

(1) 94 894 NOV 15 1994

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGIA MAE ROBERTS,
Petitioner,

V.

THE TOWN OF CANTON, A MUNICIPAL CORPORATION; and CARL LANE, CHIEF OF POLICE OF THE TOWN OF CANTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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1/3 pp

QUESTIONS PRESENTED

1. Whether 42 U.S.C. Section 1983 was violated as the result of the respondent Carl Lane misappropriating the $22.00 court costs and the respondent Town of Canton through its Court Clerk and Municipal Judge, requiring the petitioner Georgia Mae Roberts to once again pay the costs or face the penalty of jail for contempt of court and losing her driver's license.

2. Whether the Oklahoma Governmental Tort Claims Act (51 O.S. Section 151 et seq.) is an adequate deprivation remedy.

3. Whether the United States District Court for the Western District of Oklahoma should have exercised jurisdiction over this claim based on the Oklahoma Governmental Tort Claims Act ground.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 17, 1994. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), the petitioner having asserted below and asserting here deprivation of rights secured by the Constitution and Statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Section One of the Fourteeth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. This case also involves 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

3. This case also involves 28 U.S.C. § 1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

4. This case also involves the following provisions of the Statutes of Oklahoma: 51 O.S. Sections 151-172 (see appendix).

STATEMENT OF THE CASE

A citation for speeding was issued to the petitioner (hereinafter referred to as "Georgia") on the 10th day of April, 1992. The fine was paid on the 2nd day of May, 1992, with court costs of $22.00 to be paid by the 3rd of June, 1992, and later extended to the 10th day of July, 1992. Georgia

mailed the $22.00 on June 28, 1992. However, Georgia was notified by the municipal clerk that payment had not been received. Georgia was ordered to again pay the $22.00, or she would be found in contempt of court and her driver's license would be revoked. On July 24th, 1992, Georgia personally delivered the payment to the Office of the Canton Municipal Court Clerk along with a letter from her attorney protesting the double assessment.

The respondent Carl Lane, Chief of Police in Canton, picks up the mail while on patrol. A Canton Post Office employee recalls placing the envelope mailed by Georgia in the police department's post office box on June 29, 1992. Although the original payment of court costs was tendered as directed, the funds were misappropriated by the officer, and were never credited to Georgia, who was forced to pay the sum a second time, for which she seeks $22.00 for court costs assessed in duplicate, $110,000.00 for mental distress, $500,000.00 for punitive

damages, and for such other and futher relief as the Court may deem proper.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

This action is brought against the respondent, the Town of Canton (hereinafter referred to as "Town") and the respondent, Carl Lane (hereinafter referred to as "officer") under 42 U.S.C.A. §1983 and the Oklahoma Governmental Tort Claims Act, 51 O.S. §151 et seq., seeking relief for intentional constitutional torts of said officer while acting under color of state law.

28 U.S.C.A. §1331 vests federal district courts with original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

All administrative procedures for the initial review of tort claims against the Town have been satisfied, in that an administrative claim was filed with the Office

of the Clerk of the Town on September 25, 1992, within one year after the claim accrued, and ninety days expired without the Town approving the claim; therefore the Federal District Court had jurisdiction and venue over the subject matter herein, having been filed on June 15, 1993.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER 42 U.S.C. SECTION 1983 WAS VIOLATED AS THE RESULT OF CARL LANE MISAPPROPRIATING THE $22.00 COURT COSTS AND THE TOWN OF CANTON, THROUGH ITS COURT CLERK AND MINICIPAL JUDGE, REQUIRING GEORGIA MAE ROBERTS TO ONCE AGAIN PAY THE COSTS OR FACE THE PENALTY OF JAIL FOR CONTEMPT OF COURT AND LOSING HER DRIVER'S LICENSE.

The lower Courts held that because the officer's misappropriation of the $22.00 court costs was not the result of any policy or custom established by the Town, the alle-

gations of the complaint were not sufficient to support a claim. The lower Courts as well as the respondents have focused entirely on the officer's misappropriation of the $22.00 court costs, and they have paid no attention or importance whatsoever to the fact that after both the Town's Court Clerk and Municipal Judge knew about the theft of Georgia's money by the officer, they still used their governmental authority to hold her in contempt of court and deprive her of her driver's license if she did not pay the court costs/fine again. The decision was adopted by those who established the governmental policy and the officer and municipality are equally responsible. Pembaur v. Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

Damages were allowed for such actions in Goldsmith v. E. I. duPont de Nemours and Co., Inc., 571 F. Supp. 235 (D.C. Del. (1983); Madison v. Cinema, 454 N.Y.S. 2d 226 (1982); Cowan v. Prudential Insurance Co. of America,

852 F.2d 688 (C.A. 2 Conn. 1988); Hunter v. Allis-Chalmers Corp., 197 F.2d 1417 (C.A. 7th Ill. 1986); and Jones v. Western Geophysical Co., 761 F.2d 1158 (C.A. 5th Tex. 1985) (allowing punitive damages.)

A single incident can constitute a violation of Section 1983. Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961). The Chief of Police was a policymaker in accordance with City of Oklahoma City v. Tuttle, U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

The Chief of Police clearly had policymaking authority pursuant to City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, L. Ed. 2d 107 (1988). The Court further stated that the finder of fact had no discretion to determine which officers are high enough in government such that their actions can be said to represent a decision of the government itself.

In ordering deputy sheriffs to enter a physician's clinic to serve capiases on

third parties in an investigation of alleged welfare fraud, the county prosecutor was acting as the final decision maker for the county; therefore, the county could be liable under Section 1983. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. ED.2d 452 (1986). Local governments may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official decision making channels. Monell et al. v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. ED. 2d 611 (1978).

If a pattern of conduct by employees is sufficiently widespread in terms of duration or frequency, it may give rise to inference of actual or constructive knowledge of conduct on part of city, and if the city fails to curb the conduct of which it is aware, a pattern may be considered policy attributable to the city if the city's failure to act is

deliberate indifference to the rights of those affected. McLin By and Through Harvey v. City of Chicago, 742 F. Supp. 994 (N. D. Ill. 1990).

In Specht v. Jensen, 863 F.2d 700 (10th Cir. 1988), the Court held that inaction could provide a basis for a city's liability if the inaction showed deliberate indifference or tacit approval of an offensive act. The Town was notified of the missing money and chose to threaten Plaintiff with loss of her driver's license and holding her in contempt of court. This indicates deliberate indifference or tacit approval of the officer's acts. The Town is liable for Georgia's damages. The officer is liable in an individual capacity even if not liable in his official capacity. When officers act unconstitutionally they are stripped of their official and representative character and are thus subjected to the consequences of their conduct. Under 42 U.S.C.A. §1983, punitive damages may be assessed against this officer

individually to punish him for his intentional wrongful actions. Also, unauthorized official action or misusing or overstepping authority may be state action and it is immaterial whether the state has authorized the wrong complained of. Tribune Review Prb. Co. v. Thomas, D.C. Pa., 120 F. Supp. 362; Westminster School Dist. of Ornage County v. Mendez, C.C.A. Cal., 161 F.2d 774; and 36 C.J.S. Federal Courts, Section 28, Page 163. Failure of state or local officials to act in an area where they are under a duty to act, resulting in a deprivation of civil rights, may be viewed as an action under color of state law. Snowden v. Hughes, C.C.A. Ill., 132 F.2d 476, affirmed 64 A. Ct. 397, 321 U.S. 1, 88 L. Ed. 497, rehearing denied 64 S. Ct. 778, 321 U.S. 804, 88 L.Ed. 1090.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OKLAHOMA GOVERNMENTAL TORT CLAIMS ACT (51 O.S. SECTION 151 et seq.) IS AN ADEQUATE DEPRIVATION REMEDY.

The fact that Georgia is an Indian per- causes it to be very unlikely that in a rural court, as the State District Court of Blaine County is, she would receive a fair trial. She also has a communication problem with the local Judge who would be assigned to her case and she does not believe he would treat her fairly. The District Court of Blaine County is where this case would so be tried under the Oklahoma Governmental Tort Claims Act. Furthermore since some of the prospective jurors would be drawn from the Canton area of Blaine County, this would present additional problems for Georgia. Hudson v. Palmer, 486 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); and Parrat v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE LOWER COURTS SHOULD HAVE EXERCISED JURISDICTION OVER THIS CLAIM BASED ON THE OKLAHOMA GOVERNMENTAL TORT CLAIMS ACT GROUND.

The lower Courts held that jurisdiction was invoked pursuant to a federal question, 28 U.S.C. Section 1331, and Georgia's federal question failed as a matter of law. The lower Courts then stated that to reach Georgia's claim pursuant to the Oklahoma Governmental Tort Claims Act the Court would need to exercise its supplemental jurisdiction. The Courts then held that "the tort claim would be more appropriately presented in the state court."

The jurisdiction of a federal court is the power to decide a justiciable controversy. Binderup v. Pathe Exch., 44 S. Ct. 96, 263 U.S. 291, 68 L. Ed. 308; Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A. Tenn., 90 F.2d 885, cert. den. 57 S. Ct. 945, 301 U.S. 710, 81 L. Ed. 1363; Porter v. Lajeunesse, D. C. Mass., 68 F. Supp. 243; and 36 C,J,S, Federal Courts Section 4 (2), page 33. Whether such jurisdiction is acquired in a particular case depends on the nature of the cause of action alleged, and not on whether the plain-

tiff may be entitled to the relief demanded. Thompson v. Terminal Shares, C.C.A. Mo., 89 F.2d 652, cert. den. 58 S. Ct. 121, 302 U.S. 735, 82 L. Ed. 568; Bell v. Hood, D.C. Cal., 71 R. Supp. 813; Coffmam v. Breeze Corp., 65 S. Ct. 298, 323 U.S. 316, 89 L. Ed. 264; Federal Public Housing Authority v. Mobile Housing Board, C.C.A. Ala., 164 F.2d 146; and U. S. v. Lawrence County, D.C. Pa., 173 F. Supp. 307. Likewise, where a case within the jurisdiction of a federal court is presented by a complaint setting forth a substantial claim under a federal statute, jurisdiction cannot be made to stand or fail on the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged or proved. Binderup, supra.; and West Coast Exploration Co. v. McKay, 213 F.2d 582, 93 U.S. App. D.C. 307, cert. den. 74 S. Ct. 850, 347 U.S. 989, 98 L. Ed. 1123.

CONCLUSION

As to Georgia's civil rights claim the lower Courts determined that there is no genuine issue of any material fact and that the Town and the officer were entitled to judgment as a matter of law. The Courts further held that supplemental juridsiction will not be exercised over Georgia's claim pursuant to the Oklahoma Governmental Tort Claims Act. The Courts then dismissed the Oklahoma Governmental Tort Claims Act claim without prejudice.

When a Chief of Police misappropriates court costs/fine monies and then the town and its law enforcements officers require the citizen to pay again the same monies under penalties of contempt of court and/or losing her driving privileges, a civil rights claim does lie. Regardless, the lower Courts should be required to exercise supplemental jurisdiction herein.

The petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

AUG. 17, 1994

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GEORGIA MAE ROBERTS	)	
Plaintiff-Appellant,	)	
v.	)	No. 94-6083
TOWN OF CANTON, a municipal corporation; CARL JAY LANE, Chief of Police of the Town of Canton,	)	(D.C. No. CIV-93-1056-C) (W. Dist. of Okla.)
Defendants-Appellees.	)	

ORDER AND JUDGMENT *

Before LOGAN, McWILLIAMS, and BARRETT, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore

ordered submitted without oral argument.

Georgia Mae Roberts (Roberts) appeals from the district court's order granting summary judgment on behalf of the defendants on Roberts' 42 U.S.C. § 1983 civil rights claim and in electing not to exercise jurisdiction over Roberts' claim filed pursuant to the Oklahoma Governmental Tort Claims Act.

On April 10, 1992, Roberts was cited for speeding in the Town of Canton. She paid a fine and later mailed court costs of $22.00. The municipal clerk of the Town of Canton thereafter notified Roberts that the payment for the court costs had not been received, and advised Roberts that she would be found in contempt of court and that her driver's license would be revoked if she did not pay the costs. As a result, Roberts personally delivered the $22.00 to the municipal clerk. Roberts alleged in her complaint that the Town of Canton did not receive her first payment because Carl Lane, Chief of Police of the Town of Canton, misappropriated those

funds.

In her complaint, Roberts identified her federal constitutional claim as one for deprivation of her property without due process of law, and she also asserted a tort claim pursuant to the Oklahoma Governmental Tort Claims Act, 51 Okla. Stat. § 151, et seq. Roberts sued Chief of Police Lane solely in his official capacity.

In a well-reasoned Memorandum Opinion and Order, the district court ruled that Roberts' civil rights claim failed as a matter of law against both the Town of Canton and the Chief of Police Lane:

> ...because adequate post-deprivation remedies are available through the Oklahoma Governmental Tort Claims Act. 51 Okla. § 151, et seq. Plaintiff failed to respond to this issue and that proposition is unopposed. Hudson v. Palmer, 468 U.S. 517 (1984), involved an alleged "taking" of personal property making its holding

especially applicable here. If there are "adequate state post-deprivation remedies," there is no constitutional violation even if the "taking" is "intentional deprivation." Id. at 533. Id. at 4.

On appeal, Roberts contends that (1) the district court erred in granting summary judgment to the defendants on her § 1983 claim because a single incident can constitute a violation of § 1983, Chief of Police Lane had policymaking authority, and the pattern of misconduct may be considered policy attributable to the town, (2) the Oklahoma Governmental Tort Claims Act is not an adequate deprivation remedy because Roberts is an Indian person and it is unlikely that she could receive a fail trial in the District Court of Blaine County, Oklahoma, and (3) the District court erred in not exercising jurisdiction over Roberts' claim under the Oklahoma Governmental Tort Claims Act.

We affirm for substantially the reasons

set forth in the district court's Memorandum Opinion and Order entered January 28, 1994. The mandate shall issue forthwith.

Entered for the Court:

James E. Barrett

Senior United States

Circuir Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

FILED
JAN. 28, 1994
U.S. Dist. Court
Western District

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GEORGIA MAE ROBERTS, Plaintiff	)	
vs.	)	No. CIV-93-1056-C
THE TOWN OF CANTON, A Municipal Corporation and CARL LANE, Chief of Police of the Town of Canton. Defendants	)	

JUDGMENT

Upon consideration of the pleadings herein, the Court finds that defendants' Fed.R.Civ.P. 12(b)(6) Motion to Dismiss should be treated as a Motion for Summary Judgment. As to plaintiff's civil rights claim, there is no genuine issue of any material fact and defendants are entitled to judgment as a matter of law on Plaintiff's

civil rights claim. Supplemental jurisdiction will not be exercised over plaintiff's claim pursuant to the Oklahoma Governmental Tort Claims Act and this claim is dismissed without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment enter on behalf of defendants and against plaintiff on plaintiff's claim pursuant to 42 U.S.C. § 1982; plaintiff's claim pursuant to the Oklahoma Governmental Tort Claims Act is dismissed.

DATED this 28 day of January, 1994.

/S/ Robin J. Cauthron /S/

ROBIN J. CAUTHRON

UNITED STATES DISTRICT JUDGE

FILED
JAN. 28, 1994
U.S. Dist. Court
Western District

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GEORGIA MAE ROBERTS, Plaintiff	)	
vs.	)	No. CIV-93-1056-C
THE TOWN OF CANTON, A Municipal Corporation and CARL LANE, Chief of Police of the Town of Canton. Defendants	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court for consideration of defendant's motion to dismiss, or in the alternative, for summary judgment. On August 13, 1993, the Court advised the parties that the defendants' motion would be treated as one for summary judgment and invited the plaintiff to provide pertinent material. Plaintiff filed a supplement to which defendants have replied. For the rea-

sons explained below, the motion, treated as a motion for summary judgment, is granted.

Facts presented to the Court in a motion for summary judgment must be construed in the light favorable to the nonmoving party. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982); United States v. Diebold, Inc., 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the materials facts, summary judgment is appropriate. Only genuine disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A dispute is genuine if "a reasonable jury could return a verdict for the the nonmoving party." Id. at 248. The party moving for summary judgment must show entitlement to judgment beyond a reasonable doubt. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Construing the facts in the light most

most favorable to plaintiff, the facts are as follows: Plaintiff received a speeding ticket on April 10, 1992. She paid the fine and later mailed the $22 court costs. The Municipal Clerk of Canton informed the plaintiff that her court costs had not been recieved and if she did not pay the court costs, plaintiff would be found in contempt of court and her driver's license would be revoked. As a result, plaintiff personally delivered $22, which she alleges is a second payment of the court costs. Plaintiff claims the City of Canton never received her first payment of her court costs because Carl Lane, the Chief of Police for Canton, misappropriated these funds. Complaint, at ¶¶ 4, 5 (June 15, 1993).

Plaintiff identifies her claim as one for deprivation of her property without due process. Complaint, at ¶¶ 5, 7 (June 15, 1993). On these facts, plaintiff filed a civil rights suit based on 42 U.S.C.§ 1983 and a tort claim pursuant to the Oklahoma Governmental Tort Claims Act, 51 Okla. Stat. § 151, et seq. As

this Court's jurisdiction is based on 42 U.S. C. § 1983, the Court will first address that claim.

CIVIL RIGHTS CLAIM--42U.S.C. § 1983

Complaints alleging violations of § 1983 must contain two essential elements. The plaintiff must plead that the alleged conduct occured under color of state law and deprived the plaintiff of rights, privileges, or immunities guaranteed under the Constitution. Parratt v. Taylor, 451 U.S. 527, 535 (1981), rev'd on other grounds, Daniels v. Williams, 474 U.S. 327, (1986). A prima facie § 1983 case has been pled if there is a Fourteenth Amendment deprivation coupled with state action.

STATE ACTION

If their third proposition, defendants argue in most instances proof of one incident is "insufficient to impose liability against a municipality for a civil rights

violation" unless the act occured as a result of "an existing unconstitutional municipal policy or custom." Defendants' Brief, at 8-9 (July 22, 1993) (citations omitted). If the city official is the final policy maker, a single incident may be sufficient to establish liability and be deemed an act of the municipality. See Pembaur v. City of Cincinnati, 475 U.S. 469, 482 (1986). However, "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). Plaintiff sued Carl Lane, Canton's Chief of Police, in his official capacity. Complaint, at 1 (June 15, 1993). Even if Lane is the final policymaker and fits this exception, plaintiff has alleged Lane "misappropriated" her funds. Plaintiff never suggests "misappropriation" was the result of any policy or custom established by the City of Canton. Moreover, plaintiff does not claim "misappropriation" is an act within Lane's scope

of employment. Acts Lane may have committed outside the scope of his employment obviously do not constitute an official policy or custom of the City. In any event, the allegations of the complaint are not sufficient to support a claim against the City of Canton.

Plaintiff's civil rights claim fails as a matter of law as against both the City and Lane because adequate post-deprivation remedies are available through the Oklahoma Governmental Tort Claims Act. 51 Okla. Stat. § 151, et seq. Plaintiff failed to respond to this issue and that proposition is thus unopposed. Hudson v. Palmer, 468 U.S. 517 (1984), involved an alleged "taking" of personal property making its holding especially applicable here. If there are "adequate state post-deprivation remedies," there is no constitutional violation even if the "taking" is "intentional deprivation." Id, at 533. In the present case, as in Parratt, 451 U.S. at 543, "[t]here is no contention that the procedures [post-deprivation remedies] themselves

are inadequate nor is there any contention that it was practicable for the State to provide a pre-deprivation hearing. Moreover, the State [of Oklahoma] has provided [petitioner] with the means by which [she] can receive redress for the deprivation." The Court finds that the Oklahoma Governmental Tort Claims Act provides plaintiff an adequate state remedy. Accordingly, there is no constitutional violation from the facts plaintiff alleges.

This Court's jurisdiction is invoked pursuant to a federal question. 28 U.S.C. § 1331; Complaint, at 1 (June 15, 1993). The Court has found that plaintiff's federal question fails as a matter of law. Thus, to reach plaintiff's claim pursuant to the Oklahoma Governmental Tort Claims Act the Court must exercise its supplemental jurisdiction. As the tort claim would be more appropriately presented in state court, this Court declines to exercise jurisdiction over that claim.

CONCLUSION

The standards discussed above establish extremely important parameters within which a court must evaluate the propriety of summary judgment. The parties have been given an opportunity to be completely heard on the issues. From the facts alleged, plaintiff cannot establish a civil rights claim. The evidence and the pleadings show there is no genuine dispute as to any material fact and that defendants are entitled to judgment as a matter of law on plaintiff's civil rights claim. Rule 56, Fed. R. Civ. P. Having resolved that claim, the Court will not exercise its supplemental jurisdiction over plaintiff's claim brought pursuant to the Oklahoma Governmental Tort Claims Act and that claim will be dismissed without prejudice. 28 U.S.C. § 1367(c)(3).

In accordance with the foregoing, it is ordered that defendants' motion to dismiss, treated as a motion for summary judgment, is granted, and all defendants are entitled to

judgment as a matter or law against the plaintiff only on plaintiff's civil rights claim. Supplemental jurisdiction over plaintiff's Oklahoma Governmental Tort Claims Act will not be exercised and this claim is dismissed without prejudice. A judgment shall enter accordingly.

IT IS SO ORDERED this 28 day of January, 1994.

/S/ Robin J. Cauthron /S/
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

51 O.S. SECTIONS 151-172

§151: "This act shall be known and my be cited as "The Governmental Tort Claims Act."

§152: "As used in the Governmental Tort Claims Act:

1. "Action" means a proceeding in a court of competent jurisdiction by which one party brings a suit against another.

2. "Agency" means any board, commission, committee, department or other instrumentality or entity designated to act in behalf of the state or a political subdivision;

3. "Claim" means any written demand presented by a claimant or his authorized representative in accordance with this act to recover money from the state or political subdivision as compensation for an act or omission of a political subdivision or the state or an employee;

4. "Claimant" means the person or his authorized representative who files notice of a claim in accordance with this act. Only the following persons and no others may be claimants:

a. any person holding an interest in real or personal property which suffers a loss, provided that the claim of said person shall be aggregated with claims of all other persons holding an interest in the property and the claim s of other persons which are derivative of the loss, and that multiple claimants shall be considered a single claimant,

b. the individual actually involved in the accident or occurrence who suffers a loss, provided that he shall aggregate in his claim the losses of all other persons which are derivative of his loss, or

c. in the case of death, an administrator, special administrator or a personal representative who shall aggregate in his claim all losses of all persons which are derivative of the death;

5. "Employee" means any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis;

a. Employee also includes:

(1) all elected or appointed officers, members or governing bodies and other persons designated to act for an agency or other legal enity while acting in the capacity of an independent contractor or an employee of an independent contractor, and

(2) from September 1, 1991, through June 30, 1986, licensed physicians, licensed osteopathic physicians and certified nurse-midwives providing prenatal, delivery or infant care services to State Department of Health clients pursuant to a contract entered into with the State Department of Health in accordance with paragraph (3) of subsection (b) of Section 1-106 of Title 63 of the Oklahoma Statutes but only insofar as services authorized by and in conformity with the terms of the contract and the requirements of Section 1-233 of Title 63 of the Oklahoma Statutes.

b. For the purposes in this act, the following are employees of

beneficiary or beneficiaries are a city, town, school district or county. For purposes of the Governmental Tort Claims Act, a public trust shall include a municipal hospital created pursuant to Section 30-101 et seq. of Title 11 of the Oklahoma Statutes, a county hospital created pursuant to Section 781 et seq. of Title 19 of the Oklahoma Statutes, or is created pursuant to a joint agreement between such governing authorities, that is operated for the public benefit by a public trust created pursuant to Section 176 et seq. of Title 60 of the Oklahoma Statutes and managed by a governing board appointed or elected by the municipality, county, or both, who exercises control of the hospital, subject

to approval of the governing body of the municipality,county, or both, provided, this sub-paragraph shall not apply to hospitals or trusts which purchase advertising or which belong to organizations which purchase advertising, in which public funds have been used, in any media the purpose of which is to influence legislation on the civil justice system or to advocate support for or opposition to a candidate for public office,

e. for the purposes of the Governmental Tort Claims Act only, a housing authority created pursuant to the provisions of the Oklahoma Housing Authority Act,

f. for the purposes of the Governmental Tort Claims Act only, corporations organized not for profit pursuant to the provisions

of the Oklahoma General Corporation Act for the primary purpose of developing and providing rural water supply and sewage disposal facilities to serve rural residents,

g. for the purposes of the Governmental Tort Claims Act only, districts formed pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Acts,

h. for the purposes of the Governmental Tort Claims Act only, a fire protection district created pursuant to the provisions of Section 901.1 et seq. of Title 19 of the Oklahoma Statutes,

i. for the purposes of the Governmental Tort Claims Act only, a benevolent or charitable corporate volunteer or full-time fire department for an unincorporated area created pursuant to

the provisions of Section 592 et seq. of Title 18 of the Oklahoma Statutes,

j. for purposes of the Governmental Tort Claims Act only an Emergency Services Provider rendering services within the boundaries of a Supplemental Emergency Services District pursuant to an existing contract between the Emergency Services Provider and the Oklahoma State Department of Health. Provided, however, that the acquisition of commercial liability insurance covering the activities of such Emergency Services Provider performed within the State of Oklahoma Shall not operate as a waiver of any of the limitations, immunities or defenses provided for political subdivision pursuant to the terms of the Govern-

mental Tort Claims Act,

k. for purposes of the Governmental Tort Claims Act only, a conservation district created pursuant to the provisions of Section 1501-101 of Title 82 of the Oklahoma Statutes,

l. for purposes of the Governmental Tort Claims Act, districts formed pursuant to the Oklahoma Irrigation District Act, and

m. for purposes of the Governmental Tort Claims Act only, any community action agency established pursuant to Sections 5035 through 5040 of Title 74 of the Oklahoma Statutes when storing, issuing or distributing food stamps or coupons and otherwise participating in the food stamp program pursuant to a contract entered into pursuant to Section 241 of Title 56 of the Oklahoma Statutes,

this state, regardless of the place in this state where duties as employees are performed:

(1) physicians acting in an administrative capacity,

(2) resident physicians and resident interns participating in a graduate medical education program of the University of Oklahoma Health Sciences Center or the College of Osteopathic Medicine of Oklahoma State University, and

(3) faculty members and staff of the University of Oklahoma Health Sciences Center and the College of Osteopathic Medicine of Oklahoma State University, while engaged in teaching duties.

Physician faculty member and staff of of the University of Oklahoma Health Sciences Center and the College of

Oseteopathic Medicine of Oklahoma State University not acting in an administrative capacity or engaged in teaching duties are not employees or agents of the state. However, in no event shall the state be held liable for the tortious conduct of any physician, resident physician or intern while practicing medicine or providing medical treatment to patients;

6. "Loss" means death or injury to the body or rights of a person or damage to real or personal property or rights therein;

7. "Municipality" means any incorporated city or town, and all institutions, agencies or instrumentalities of a municipality;

8. "Political subdivision" means:

a. a municipality,

b. a school district,

c. a county,

d. a public trust where the sole

and all their institutions, instrumentalities or agencies;

9. "Scope of employment" means performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority including the operation or use of an agency vehicle or equipment with actual or implied consent of the supervisor of the employee, but shall not include corruption or fraud;

10. "State" means the State of Oklahoma or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality thereof; and

11. "Tort" means a legal wrong, independent of contract, involving violation of a duty imposed by general law or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or

omission of a political subdivision or the state or an employee acting within the scope of employment.

§153: A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in this act and only where the state or political subdivision, if a private person or enity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of this act for any act or omission of an employee acting outside the scope of his employment.

B. The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a

political subdivision or employee at common law or otherwise.

§154: A. The total liability of the state and its political subdivisions on claims within the scope of this act arising out of an accident or occurrence happening after the effective date of this act shall not exceed:

1. Twenty-five Thousand Dollars ($25,000.00) for any claim or to any claimant who has more than one claim for loss of property arising out of a single accident or occurance;

2. One Hundred Thousand Dollars ($100,000.00) to any claimant for his claim for any other loss arising out of a single accident or occurrence except however, the limits of said liability for the State of Oklahoma Teaching Hospitals shall be Two Hundred Thousand Dollars ($200,000.00);

or

3. One Million Dollars ($1,000,000.00) for any number of claims arising out of a single occurrence or accident.

B. No award for damages in an action or any claim against the state or a political subdivision shall include punitive or exemplary damages.

C. When the amount awarded to or settled upon multiple claimants exceeds the limitations of this section, any party may apply to the district court which has jurisdiction of the cause to apportion to each claimant his proper share of the total amount limited herein. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising our of the occurrance. When the amount of the aggregate

losses presented by a single claimant exceeds the limits of paragraphs 1 or 2 of subsection A of this section, each person suffering a loss shall be entitled to his proportionate ahare.

D. The total liability of resident physicians and interns while participating in a graduate medical education program of the University of Oklahoma College of Medicine, its affiliated institutions and the Oklahoma College of Osteopathic Medicine and Surgery shall not exceed One Hundred Thousand Dollars ($100,000.00).

E. The state or a political subdivision may petition the court that all parties and actions arising our of a single accident or occurrence shall be joined as provided by law, and upon order of the court the proceedings upon good cause shown shall be continued for a reasonable time or until such joinder has been completed.

The state or political subdivision shall be allowed to interplead in any action which may impose on it any duty or liability pursuant to this act.

F. The liability of the state or political subdivision under this act shall be several from that of any other person or entity, and the state or political subdivision shall only be liable for that percentage of total damages that corresponds to its percentage of total negligence. Nothing in this section shall be construed as increasing the liability limits imposed on the state or political subdivision under this act.

§155: The state or a political subdivision shall not be liable if a loss or claim results from:

1. Legislative functions;

2. Judical, quasi-judicial, or prose-

cutorial functions;

3. Execution or enforcement of the lawful orders of any court;

4. Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any stature, chapter provision, ordinance, resolution, rule, regulation or written policy;

5. Performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;

6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;

7. Any claim based on the theory of attractive nuisance;

8. Snow or ice conditions or temporary or natural conditions on any

public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the state or a political subdivision;

9. Entry upon any property where that entry is expressly or impliedly authorized by law;

10. Natural conditions of property of the state or political subdivision;

11. Assessment or collection of taxes or special assessments, license or registration fees, or other fees or charges imposed by law;

12. Licensing powers or functions including, but not limited to, the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority;

13. Inspection powers or functions including failure to make an inspec-

tion, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

14. Any loss to any person covered by any workers' compensation act or any employer's liability act;

15. Absence, condition, location or malfunction of any traffic or road sign, signal or warning device unless the absence, condition, location or malfunction is not corrected by the state or political subdivision responsible within a reasonable time after actual or constructive notice or the removal or destruction of such signs, signals or warning devices by third parties, action of weather elements or as a result of traffic collision

except on failure of the state or political subdivision to correct the same within a reasonable time after actual or constructive notice. Nothing herein shall give rise to liability arising from the failure of the state or any political subdivision to initially place any of the above signs, signals or warning devices. The signs, signals and warning devices referred to herein are those used in connection with hazards normally connected with the use of roadways or public ways and do not apply to the duty to warn of special defects such as excavations or roadway obstructions;

16. Any claim which is limited or barred by any other law;

17. Misrepresentation, if unintentional;

18. An act or omission of an independent contractor or consultant or his employees, agents, subcontractors or

suppliers or of a person other than an employee of the state or political subdivision at the time the act or omission occurred;

19. Theft by a third person of money in the custody of an employee unless the loss was sustained because of the negligence or wrongful act or omission of the employee;

20. Participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a political subdivision;

21. Any court-ordered or Department of Corrections approved work releases program; provided, however, this provision shall not apply to claims from inidviduals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

22. The activities of the National Guard, the militia or other military organization administered by the Military Department of the state when on duty pursuant to the lawful orders of conpetent authority in an effort to quell a riot or in response to a natural disaster or military attack;

23. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

24. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resul-

ting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee;

25. Any claim or action based on the theory of manufacturer's products liability or breach of warranty, either expressed or implied;

26. Any claim or action based on the theory of indemnification or subrogation.

27. Any claim based upon an act or omission of an employee in the placement of children;

28. Acts or omissions done in conformance with then current recognized standards;

29. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have

occured but for a negligent affirmative act of the state; or

30. Any confirmation of the existence or nonexistence of any effective financing statment on file in the office of the Secretary of State made in good faith by an employee of the office of the Secretary of State as required by the provisions of Section 9-307.6 of Title 12A of the Oklahoma Statutes.

§155.1: Nothing contained in this act shall be construed as allowing an action or recovery against the state or any of their officers or employees on a claim or cause of action founded upon any loss occurring from a defect or dangerous condition on any road, street or highway which was in existence, whether known or unknown:

1. On October 1, 1985; or

2. When an existing facility became

or becomes a part of the state highway system; or

3. When an existing facility became or becomes the maintenance responsibility of the state, to the extent of that responsibility;

provided that this section shall be effective until 12:01 a.m., October 1, 1995.

To the extent that the state is required by law to maintain a road, street or highway within the territorial limits of a political subdivision, the political subdivision shall not be liable for any loss occuring from a defect or dangerous condition in the area required to be maintained by the state.

§156: A. Any person having a claim against the state or a political subdivision within the scope of Section 151 et seq. of this title shall present a

claim to the state or political subdivision for any appropriate relief including the award of money damages.

B. Claims against the state or a political subdivision are to be presented within one (1) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs.

C. A claim against the state shall be in writing and filed with the Office of the Risk Management Administrator of the Purchasing Division of the Office of Public Affairs who shall immediately notify the Attorney General and the agency concerned and conduct a diligent investagation of the validity of the claim within the time specified for approval or denial of claims by Section 157 of this title. A claim may be filed by certified mail

with return receipt requested. A claim which is mailed shall be considered filed upon receipt by the Office of the Risk Management Administrator.

D. A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body.

E. The written notice of claim to the state or a political subdivision shall state the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, the amount of compensation or other relief demanded, the name, address and telephone number of the claimant, and the name, address and telephone number of any agent authorized to settle the claim. Failure to state either the date, time, place and circumstances and amount of compensation demanded shall not invali-

date the notice unless the claimant declines or refuses to furnish such information after demand by the state or political subdivision. The time for giving written notice of claim pursuant to the provisions of this section does not include the time during which the person injured is unable due to incapacitation from the injury to give such notice, not exceeding ninety (90) days of incapacity.

F. When the claim is one for death by wrongful act or omission, notice may be presented by the personal representative within one (1) year after the alleged injury or loss resulting in such death. If the person for whose death the claim is made has presented notice that would have been sufficient had he lived an action for wrongful death may be brought without any additional notice.

§157: A. A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the interested parties have reached a settlement before the expiration of that period. A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. The claimant and the state or political subdivision may continue attempts to settle a claim, however, settlement negotiations do not extend the date of denial.

B. No action for any cause arising under this act, Section 151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section. Neither the claimant

nor the state or political subdivision may extend the time to commence an action by continuing to attempt settlement of the claim.

§158: A. The state or a political subdivision, after conferring with authorized legal counsel, may settle or defend against a claim or suit brought against it or its employee under this act subject to any procedural requirements imposed by statute, ordinance, resolution or written policy, and may appropriate money for the payment of amounts agreed upon. When the amount of any settlement exceeds Ten Thousand Dollars ($10,000.00), and any payment required by the settlement will not be paid through an applicable contract or policy of insurance, the settlement shall not be effective until approved by the district court and entered as a judgment as provided by law.

B. If a policy or contract of liability insurance covering the state or political subdivision or its employees is applicable, the terms of the policy govern the rights and obligations of the state or political subdivision and the insurer with respect to the investigation, settlement, payment and defense of claims or suits against the state or political subdivision or its employees covered by the policy. However, the insurer may not enter into a settlement for an amount which exceeds the insurance coverage without the approval of the governing body of the state or political subdivision or its designated representative if the state or political subdivision is insured.

C. Nothing in this section shall be construed to repeal or modify Sections 361 through 365.6 and 435 of Title 62 of the Oklahoma Statutes and it is intended that this section be construed

in conformance with those sections.

D. The state or a political subdivision shall not be liable for any costs, judgments or settlements paid through an applicable contract or policy of insurance but shall be entitled to set off those payments against liability arising from the same occurrence.

E. The state or a political subdivision shall have the right of subrogation against the insurer issuing any applicable contractor policy of insurance to the onetary limit of said policy of incurance or contract, if judgment or settlement of any claim arising pursuant to this act results in the imposition of monetary liability upon the state or the political subdivision.

§159: A. Judgments recovered against the

state or political subdivision under the provisions of this act shall be enforced in the same manner and to the same extent as judgments are now enforced against the state or political subdivisions under the law except as herein provided.

B. If the judgment is obtained against the state or a political subdivision that has procured a contract or policy of liability or indemnity insurance protection, the holder of the judgment may use the methods of collecting the judgment which are provided by the policy or contract or law to the extent of the limits of coverage provided.

C. For the payment of any judgment obtained under the provisions of this act against a political subdivision that is a self-insurer or not fully covered by liability insurance, the manner of paying a money judgment

shall be as follows. Proof of indebtedness, as required in Sections 362 through 364 of Title 62 of the Oklahoma Statutes and evidence of any estimated tax levy or increases necessary to reimburse the sinking fund for the purposes of the judgment as provided in Section 431 of Title 62 of the Oklahoma Statutes, and other evidence or statements which the court may require, shall be made to the court before final judgment is rendered. As an alternative to paying the money judgment out of the sinking fund at the rate of one-third (1/3) each year, the court, based on consideration of evidence and proof, any provide for the hudgment to be paid over a period of not less than one(1) nor more than ten (10) years. The interest rate on any judgment when payment is extended more than three (3) years shall be at the rate perscribed by law for

the first three (3) years and at the rate of six percent (6%) for each remaining year.

D. Money judgments against the state not payable by insurance shall be paid in the following manner. An agency whose act or omission gave rise to the judgment may, at its discretion and upon approval of the Director of State Finance, pay a judgment or any portion thereof from any funds available to it. Provided, however, no agency shall be required to pay a judgment prior to the fiscal year next following the fiscal year in which the judgment is obtained. Any such judgment may be paid at a rate of one-third (1/3) per fiscal year from funds available for operation of the agency.

E. Nothing in this act shall be interpreted as allowing liens on public property.

§160: The state or political subdivision shall have the right to recover from an employee for any claim or action under this act or any other claim or action any payments made by it for any judgment or settlement, or portion thereof, and costs or fees by or on behalf of an employee's defense if it is shown that the conduct of the employee which gave rise to the claim or action was ourside the scope of his employment, or if the employee fails to cooperate in good faith in the defense of the claim or action. A judgment or settlement in an action or claim under this act shall constitute a complete bar to any action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement. Nothing in this act shall be construed to authorize the state or political subdivision to pay for any

punitive or exemplary damages rendered against an employee.

§161.1: When the state has a duty to defend any action pursuant to the provisions of this act, it shall be the duty of the Attorney General to defend all such actions, unless an agency of the state is authorized by law to employ its own attorneys, in which case said attorneys may defend such actions against the agency or the agency may request that the Attorney General defend such actions. If such a request is made, the Attorney General shall defend any such action.

§162: A. The state or any political subdivision, subject to procedural requirements imposed by this section, other applicable statute, ordinance, resolution or written policy, shall:

1. Provide a defense for any em-

ployee as defined in Section 152 of this title when liability is sought for any violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States when alleged to have been committed by the employee while acting within the scope of employment; and

2. Pay or cause to be paid any judgment entered in the courts of the United States, the State of Oklahoma or any other state against any employee and/or political subdivision or settlement agreed to by the political subdivision entered against any employee, and any costs or fees, for a violation of property rights or any rights, privileges or immunities secured by the Constitution or laws of the United States which occured while the employee was acting within the scope of

employment. The maximum aggregate amount of indemnification paid directly from funds of the state or any political subdivision to or on behalf of any employee pursuant to this section shall not exceed the manimum figures authorized by the provisions of Section 154 of this title, regardless of the number of persons who suffer damage, injury or death as a result of the occurrence, unless, in the case of a political subdivision, the political subdivision establishes higherlimits by ordinance, if a minicipality, or, as to other political subdivisions, by resolution, published as required by law.

B. 1. The state or a political subdivision shall not be required to indemnify any employee of the state or a political subdivision under the provisions of this section,

unless the employee is judically determined to be entitled to such indemnification and a final judgment therefor is entered. The exclusive means of recovering indemnification from the state shall be by filing an application for indemnification in the district court of the county where venue is proper as provided for in paragraph 2 of this subsection. The exclusive means of recovering indemnification from a political subdivision shall be by filing an application for indemnification in the trial court where the judgment was entered. If the federal trial court cannot hear the action, such application shall be filed in the district court of the county where the situs of the municipality is located. Actions to determine entitlement to indemnification shall be tried to the court,

sitting without a jury.

2. Venue for actions to determine entitlement to indemnification from the state shall be in Okalhoma County, except that a constitutional state agency, board or commission may, upon a resolution being filed with the Secretary of State, designate another situs for venue in lieu of Oklahoma County.

3. All applications for indemnification from the state or a political subdivision shall be filed in the name of the real party or parties in interestm and in no event shall any application be presented , not recovery made under the right of subrogation. Indemnification from the state as provided for in this subsection shall extend only to acts or omissions occurring on or after January 1, 1984. The employee of the state or a political subdivi-

sion must file his application for indemnification within thirty (30) days of final judgment, or the right to seek indemnification shall be lost forever.

4. In order to recover indemnification from the state or a political subdivision pursuant to this subsection, the court shall determine by a preponderance of the evidence that:

a. the employee reasonably cooperated in good faith in the defense of the action upon which the judgment or settlement was awarded and for which indemnification is sought;

b. the actions or ommissions upon which such a judgment or settlement has been rendered were not the result of fraudulent conduct or corruption by the employee;

c. the employee, in committing the acts or omissions upon which such a judgment or settlement has been rendered was acting in good faith and within any applicable written administrative policies known to the employee at the time of the omissions or acts complained of;

d. the employee was acting within the scope of his employment at the time that the acts or omissions upon which a judgment or settlement has been rendered were committed by the employee;

e. the acts or ommissions of the employee upon which a judgment or settlement has been rendered were not motivated by invidious discriminatory animus directed toward race, sex or national origin; and

f. when punitive or exemplary

damages are included in the total award rendered against the employee of a political subdivision, the indemnification amount sought for fees and costs does not include amounts attributable to the employee's defense against such punitive or exemplary damages in accordance with paragraph D of this section.

5. a. Any indemnification judgment against the state under this section shall be an encumbrance against otherwise available unencumbered monies and unallocated unemcumbered monies in the appropriations of the agency on whose behalf the employee to be indemnified was acting at the time of the act or omission upon which the judgment or settlement was awarded

and for which indemnification was sought.

b. If sufficient unencumbered monies or unallocated unencumbered monies do not exist in the agency's appropriations to pay the indemnification, the agency shall make application to the Risk Management Division of the Office of Public Affairs for full payment of the indemnification out of the Tort Claims Liability Revolving Fund established pursuant to Section 85.35 of Title 74 of the Oklahoma Statutes. Payment out of this fund shall be authorized if there are sufficient monies greater than the sum total of the then pending fund indemnification judgment requests, and the reserves for future tort claims as certified by the

Director of Risk Management.

c. If sufficient monies do not exist in the Tort Claims Liability Revolving Fund, the agency shall request the Legislature to make an appropriation sufficient to pay the indemnification.

d. Any indemnification judgment against a political subdivision shall be paid as provided in Section 361 through 365.6 of Title 62 of the Oklahoma Statutes and Section 159 of this title.

C. The state or political subdivision shall have the right to recover from an employee the amount expended by the state or political subdivision to provide a defense, or pay a settlement agreed to by the employee and the state or political subdivision, or pay the final jusgment,

if it is shown that the employee's conduct which gave rise to the action was fraudulent or corrupt or if the employee fails to reasonably cooperate in good faith in defense of the action.

D. The state or a political subdivision shall not, under any circumstances, be responsible to pay or indemnify any employee for any punitive or exemplary damages rendered against the employee, not to pay for any defense, judgment, settlement, costs or fees which are paid or covered by any applicable policy or contract of insurance. Where any civil rights judgment upon which indemnification under subsection B of this section is applied for by an employee of the state includes an award for both actual and punitive or exemplary damages, the total amount of fees and costs for

which indemnification may be allowed shall be limited to the percentage of fees and costs in the total award that the percentage of the award of actual damages bears to the total judgment awarded. It is the public policy of the State of Oklahoma that the state or a political subdivision may indemnify its employee for actual damages, fees and costs as provided herein in any case in which the findings set out in paragraph B of this section have been determined.

E. Nothing in this section shall be construed to waive any immunities available to the state under the terms of the Eleventh Amendment to the Constitution of the United States. Any immunity or other bar to a civil lawsuit under the state or federal law shall remain in effect. The fact that the state or

a political subdivision may relieve an employee from all judgments, settlements, costs or fees arising from the civil lawsuit ahall not, under any circumstances, be communicated to any trier of fact in case of any trial by jury.

§163: A. Venue for actions against the state within the scope of this act shall be either the county in which the cause of action arose or Oklahoma County, except that a constitutional state agency, board or commission may, upon resolution filed with the Secretary of State, designate another situs for venue in lieu of Oklahoma County.

B. Actions against all political subdivisions within the scope of this act shall be brought in the county in which the situs of the political subdivision is located or in

the county in which the cause of action arose.

C. Suits instituted pursuant to the provisions of this act shall name as defendant the state or the political subdivision against which liability is sought to be established. In no instance shall an employee of the state or political subdivision acting within the scope of his employment be named as defendant with the exception that suits based on the conduct of resident physicians and interns shall be made against the individual consistent with the provisions of Title 12 of the Oklahoma Statutes.

D. All actions agaisnt the state or political subdivision shall be filed in the name of the real party or parties in interest, and in no event shall any claim be presented nor recovery be made under the right of subrogation.

E. In all actions against the state, service shall be perfected by mailing, by certified mail, return receipt requested, a summons and a copy of the petition to the Attorney General. Claimant shall also mail, by certified mail, return receipt requested, a copy of the summons and a copy of the petition to the administrative head of the state agency or agnecies involved and a copy of the summons and a copy of the petition to the Risk Management Administrator of the Purchasing division of the Office of Public Affairs.

F. In suits against political subdivisions the petition and summons shall be served in the manner prescribed by law for civil cases generally. If no method is prescibed by law, then service may be had on the administrative head of

the political subdivision being sued, if available, and if not, the court in which the suit is pending may authorize service in such manner as may be calculated to afford the political dubdivision a fair opportunity to answer and defend the suit.

G. No attempt shall be made in the trial of any action brought against the state or any political subdivision or employee within the scope of this act to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of the plaintiff.

§164: The laws and statutes of the State of Oklahoma and the Rules of Civil Procedure, as promulgated and adopted by the Supreme Court of Oklahoma insofar as applicable and to the extent that

such rules are not inconsistent with the provisions of this act, shall apply to and govern all actions brought under the provisions of this act.

§165: This act does not apply to any claim against any political subdivision or employee arising before the effective date of this act. Any such claim may be presented and enforced to the same extent and subject to the same procedures and restrictions as if this act had not been adopted.

§166: The distinction existing between governmental functions and proprietary functions of political subdivisions shall not be affected by the provisions of this act, however the provisions of this act shall apply to both governmental and proprietary functions.

§167: A. The governing body of any municipality may:

1. Insure the municipality against all or any part of any liability it may incur for death, injury or disability of any person or for damage to property, either real or personal;
2. Insure any employee of the municipality against all or any part of his liability for injury or damage resulting from an act or omission in the scope of employment.
3. Insure against the expense of defending a claim against the municipality or its employee, whether or not liability exists on such claim; or
4. Insure the municipality or its employee against any loss, damage or liability as defined by Sections 702 through 708 of

Title 36 of the Oklahoma Statutes, or other forms of insurance provided for in Title 36 of the Oklahoma Statutes.

The cost or premium of any such insurance is a proper expenditure of the municipality.

As used in this subsection, "employee" means any person who has acted in behalf of a minicipality, whether that person is acting on a permanent or temporary basis with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies of a municipality, and persons appointed, and other persons designated by a municipality to act in its behalf.

B. Any insurance authorized by law to be purchased, obtained or provided by a municipality may be provided by:

1. Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes. Any self-insurance reserve fund shall be nonfiscal and shall not be considered in computing any levy when the municipality makes its annual estimate for needed appropriations;

2. Insurance in any insurer authorized to transact insurance in this state;

3. Insurance secured in accordance with any other method provided by law; or

4. Any combination of insurance authorized by this section.

C. Two or more municipalities or public agencies, by interlocal agreement made pursuant to Sections 1001 et seq. of Title 74 of the Oklahoma

Statutes, may provide insurance for any purpose by any one or more of the methods specified in this section. The pooling of self-insured reserves, claims or losses among governments as authorized in this act shall not be construed to be transacting insurance nor otherwise subject to the provisions of the laws of this state regulating insurance companies. Two or more municipalities may also be insured under a master policy or contract for insurance. Premium costs may be set individually for each municipality or apportioned among participating municipalities as provided by the master policy or contract.

§168: A. The board of education of any school district may:

1. Insure the school district

against all or any part of any liability it may incur for death, injury or disability of any person, or for damage to property, either real or personal;

2. Insure any employee of the school district against all or any part of his liability for injury or damage resulting from an act or omission in the scope of employment.

3. Insure against the expense of defending a claim against the school district or its employee, whether or not liability exists on such claim; or

4. Insure the school district or its employee against any loss, damage or liability as defined by Sections 702 through 708 of Title 36 of the Oklahoma Statutes, or other forms of insurnace provided for in Title 36 of the

Oklahoma Statutes.

The cost or premium of any such insurance is a proper expenditure of the school district.

As used in this subsection, "employee" means any person who has acted in behalf of a school district, whether that person is acting on a permanent or temporary basis with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies of a school district and persons appointed, and other persons designated by a school district to act in its behalf.

B. Any insurance authorized by law to be purchased, obtained or provided by a schoold district may be provided by:

1. Self-insurance, which may be,

but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes. Any self-insurance reserve fund shall be nonfiscal and shall not be considered in computing any levy when the school district makes its annual estimate for needed appropriations;

2. Insurance in any insurer authorized to transact insurance in this state;

3. Insurance secured in accordance with any other method provided by law; or

4. Any combination of insurance authorized by this section.

C. Two or more school districts or public agencies, by interlocal agreement made pursuant to Sections 1001 etseq. of Title 74 of the Oklahoma Statutes, may

provide insurance for any purpose by any one or more of the methods specified in this section. The pooling of self-insured reserves, claims or losses among governments as authorized in this section shall not be construed to be transacting insurance not otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies. Two or more school districts may also be insured under a master policy or contract of insurance. Premium costs may be set individually for each school district or apportioned among participating school districts as provided by the master policy or contract.

§169: A. The governing body of any county may:

1. Insure the county against all or any part of any liability it may incur for death, injury or disability of any person or for damage to property, either real or personal;
2. Insure any employee of the county against all or any part of his liability for injury or damage resulting from an act or omission in the scope of employment;
3. Insure against the expense of defending a claim against the county or its employee, whether or not liability exists on such claim; or
4. Insure the county or its employee against any loss, damage or liability as defined by Sections 702 through 708 of Title 36 of the Oklahoma Statutes, or other forms

of insurance provided for in Title 36 of the Oklahoma Statutes.

The cost or premium of any such insurance is a proper expenditure of the county.

As used in this subsection, "employee" means any person who has acted in behalf of a county, whether that person is acting on a permanent or temporary basis with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies of a county, and persons appointed, and other persons designated by a county to act in its behalf.

B. Any insurance authorized by law to be purchased, obtained or provided by a county may be provided by:

1. Self-insurance, which may be, but is not required to be, funded by appropriations to establish or maintain reserves for self-insurance purposes. Any self-insurance reserve fund shall be nonfiscal and shall not be considered in computing any levy when the county makes its annual estimate for needed appropriations;

2. Insurance in any insurer authorized to transact insurance in this state;

3. Insurance secured in accordance with any other method provided by law; or

4. Any conbination of insurance authorized by this section.

C. Two or more counties or public agencies, by interlocal agreement made pursuant to Sections 1001 et seq. of Title 74 of the Oklahoma Stat-

utes, may provide insurance for any purpose by any one or more of the methods specified in this section. The pooling of self-insured reserves, claims or losses among governments as authorized in this act shall not be construed to be transacting insurance nor otherwise subject to the provisions of the laws of this state regulating insurance or insurance companies. Two or more counties may also be insured under a master policy or contract of insurance. Premium costs may be set individually for each county or approtioned among participating counties as provided by the master policy of contract.

§170: This act is exclusive and supersedes all home rule charter provisions and special laws on the same subject heretofore, and all acts or parts of acts in conflict herewith are repealed.

§171: Nothing in this act shall abrogate or amend in any way presently existing remedies, causes of actions or claims presently existing on behalf of individuals or citizens. This act does not apply to any claim against the state or political subdivision arising before the effective sate of this act.

§172: A. The governing body of any corporation organized not for profit for the primary purpose of developing and providing rural water supply and sewage disposal facilities to serve rural residents and districts formed pursuant to the Rural Water, Sewer, Gas and Solid Waste Management districts Act. Section 1324.1 et seq. of Title 82 of the Oklahoma Statutes, may:

1. Insure said entity against all or any part of any liability it

may incur for death, injury or disability of any person or for damage to property, either real or personal;

2. Insure any employee of said entity against all or any part of his liability for injury or damage resulting from an act or omission in the scope of employment;
3. Insure against the expense of defending a claim against said entity or its employee, whether or not liability exists on such claim;
4. Insure said entity or its employee against any loss, damage or liability as provided by Sections 702 through 708 of Title 36 of the Oklahoma Statutes; or
5. Provide other forms of insurance provided for in Title 35 of the Oklahoma Statutes.

The cost or premium of any such insurance is a proper expenditure of said entity.

As used in this subsection, "employee" means any person who has acted in behalf of said entity, whether that person is acting on a permanent or temporary basis with or without being compendated or on a full-time or part-time basis. The term "employee" shall also include but not be limited to all elected or appointed officers, members of governing bodies of said entity, and other persons designated by said entity to act in its behalf.

B. Any insurance authorized by law to be purchased, obtained or provided by said entity may be provided by:

1. Self-insurance, which may be, but is not required to be, funded by appropriations to

establsih or maintain reserves for self-insurance purposes;

2. Insurance with any insurer authorized to transact insurance in this state;
3. Insurance secured in accordance with any other method provided by law; or
4. Any combination of insurance authorized by this section.

C. Two or more said entities or public agencies, by interlocal agreement made pursuant to Section 1001 et seq. of Title 74 of the Oklahoma Statutes, may provide insurance for any purpose by any one or more of the methods specified in this section. The pooling of self-insured reserves, claims or losses among said entities as authorized in this act shall not be construed to be transacting insurance nor otherwise subject to the provisions

of the laws of this state regulating insurance or insurance companies. Two or more said entities may also be insured under a master policy or contract of insurance. Premium costs may be set individually for each entity or apportioned among participating entities as provided by the master policy or contract.

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No. 94-894

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGIA MAE ROBERTS,

Petitioner,

v.

THE TOWN OF CANTON,
A MUNICIPAL CORPORATION; and CARL LANE,
CHIEF OF POLICE OF THE TOWN OF CANTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 14 AND 24.1(a) QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD GRANT CERTIORARI WHEN PETITIONER HAS NOT INVOKED ANY CONSIDERATION LISTED IN RULE 10.1?

II.

WHETHER SUMMARY JUDGMENT WAS APPROPRIATE FOR PETITIONER'S CIVIL RIGHTS CLAIM WHEN SHE FAILED TO ALLEGE OR IDENTIFY AN UNCONSTITUTIONAL PATTERN, PRACTICE OR POLICY OF CANTON AND FAILED TO DEMONSTRATE AN UNCONSTITUTIONAL ACT BY A POLICY MAKER IN THE SCOPE OF EMPLOYMENT?

III.

WHETHER SUMMARY JUDGMENT WAS APPROPRIATE FOR PETITIONER'S DEPRIVATION OF DUE PROCESS CLAIM WHEN THE ALLEGEDLY WRONGFUL ACT WAS AN INTENTIONAL TAKING OF MONEY AND ADEQUATE STATE LAW BASED TORT REMEDIES EXIST?

IV.

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING WITHOUT PREJUDICE PETITIONER'S PENDANT STATE LAW BASED TORT CLAIM AFTER IT ENTERED JUDGMENT FOR RESPONDENTS ON THE FEDERAL CLAIMS WHICH GAVE IT ORIGINAL JURISDICTION?

RULE 29.1 STATEMENT

Respondent, TOWN OF CANTON, is a municipal corporation organized under the laws of Oklahoma as a Statutory Town Board of Trustees government and has no parent company and no corporate subsidiaries.

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IN THE

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OCTOBER TERM, 1994

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THE TOWN OF CANTON,
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CHIEF OF POLICE OF THE TOWN OF CANTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case, with the following additions and corrections, pursuant to Rule 24.2.

PROCEDURE

Petitioner's original Complaint alleged that she was deprived of twenty-two dollars without due process of law when Respondent Lane, sued only in his official capacity, purportedly "misappropriated" a payment of court costs for a traffic ticket; and, that Respondent Canton was liable for the "intentional constitutional torts" of its employee, Lane. (Resp.App. 1-3)

On June 22, 1993, Respondents Canton and Lane moved to dismiss, or in the alternative for summary judgment, and submitted a brief in support. Respondent filed a response on August 11, 1993.

On August 13, 1993, the District Court entered an order directing Petitioner to submit any pertinent documentation since it intended to consider Respondents' pending motion as one for summary judgment. Although Petitioner submitted a supplemental response to Respondents' motion, no evidentiary materials were presented. Respondents filed a Reply.

On January 28, 1994, the District Court entered its Judgment and Memorandum Opinion and order. (Pet. App. 23-24). Petitioner's pendant state law based tort claim was dismissed without prejudice when the Court, in its discretion, declined to exercise supplemental jurisdiction pursuant to 28 U.S.C. §1367(C)(3). (Pet. App. 24, 31-32).

Petitioner perfected an appeal to the United States Court of Appeals for the Tenth Circuit and it entered its Order and Judgment on August 17, 1994. (Pet.App. 18-22).

FACTS

Respondent Town of Canton is a municipality in the Western District of Oklahoma organized with a Statutory Town Board of Trustees government. Respondent Lane is the Chief of Police for Canton.

Petitioner's Complaint alleged that she received a traffic citation for speeding on April 10, 1992. She claimed to have paid the ticket on May 2, 1992, and agreed to pay twenty-two dollars in related court costs by June 3, 1992. She claimed to have received an extension until July 10, 1992, to pay the costs.

Petitioner maintained in her pleadings that she mailed a payment of court costs on June 28, 1992, but was later informed by Canton's Clerk that the payment had not been received. Plaintiff alleged that she subsequently personally delivered payment of the court costs on July 24, 1992.

Petitioner alleged that Chief Lane picks up Police Department mail from Canton's post office and that a postal worker placed her original payment of the costs in the Police Department mailbox. Petitioner alleged that Chief Lane "misappropriated" the funds and that this "intentional constitutional" tort was performed under color of state law.

SUMMARY OF ARGUMENT

Petitioner's request for a Writ of Certiorari should be denied because she has not identified any special or important reason listed in Rule 10.1(a) which might be applicable to this case. The Order and Judgment of the United States Court of Appeals for the Tenth Circuit are not in conflict with any other court of appeals on the same matter. Neither did the Tenth Circuit decide a

federal question in a way in conflict with any state court of last resort. Finally, neither the Tenth Circuit's judgment nor that of the District Court which it affirmed departed from any acceptable and usual course of proceedings such that an exercise of this Court's supervisory powers is appropriate. Absent the applicability of any of these concerns, the requested writ should be denied.

Substantively, the District Court's summary judgment and dismissal entered in favor of Respondents were properly affirmed for three reasons. First, Petitioner did not allege or identify any state action with respect to her claim that she was deprived of property without due process of law. Thus, the claim failed. This is so because she did not allege or identify any unconstitutional pattern, practice or policy by Canton which deprived her of protected rights. Neither did she identify any single wrongful act by a policy maker acting within the scope of his or her duties sufficient to create liability from a single incident. Absent these requisite elements, Petitioner's claim failed as a matter of law.

Second, Petitioner could not show a deprivation of due process of law even if an unconstitutional policy or act by a policy maker existed. This is because Petitioner has an adequate post-deprivation state law based tort remedy available in the form of Oklahoma's Governmental Tort Claims Act, 51 O.S. §151, et seq. Because Petitioner alleged an intentional, wrongful taking of money, it would have been impossible for Respondent Canton to have provided pre-deprivation due process. Petitioner did not respond to this argument before the District Court and, hence, has waived any claim of error. (Pet.App. 20, 30). Further, this Court has held that post-deprivation state tort remedies are adequate due

process of law under analogous circumstances. Therefore, Petitioner's federal claim also failed as a matter of law since she cannot show a deprivation of due process.

Finally, the Tenth Circuit correctly recognized that the District Court did not abuse its discretion by dismissing Petitioner's state law tort claim without prejudice following the entry of judgment on the deprivation of due process claim. Once the District Court had disposed of the federal claim which gave it original jurisdiction, it had discretionary authority to dismiss any pendant claim pursuant to 28 U.S.C. §1367(C)(3).

Petitioner's claim that she could not receive a fair hearing in state court as a Native American who has "difficulties" with the local judge (Petitioner's Brief at 12) was raised for the first time on appeal to the Tenth Circuit. Technically, it addresses Respondents' argument that Oklahoma's Governmental Tort Claims Act provides adequate due process of law, an argument which Petitioner confessed before the District Court. (Pet.App. 20, 30). As such, it should not provide the basis for the requested Writ.

For all these reasons, Petitioner's request for a Writ of Certiorari should be denied.

ARGUMENT AND AUTHORITY

I.

PETITIONER'S REQUESTED WRIT SHOULD BE DENIED SINCE SHE HAS FAILED TO DEMONSTRATE HOW ANY RULE 10.1 CONSIDERATION IS APPLICABLE IN THE INSTANT CASE.

Rule 10.1 of this Court's rules clearly states that a review on Writ of Certiorari is a matter of judicial discretion. As the Rule states, a Writ will only be granted when there are "special and important reasons." Although the Rule by its own terms does not contain an exhaustive or comprehensive list of the reasons which compel this Court to exercise its discretion, it does give guidance. Petitioner has not explained how any of these guiding principles are applicable in the instant case.

Specifically, Rule 10.1(a) identifies several reasons for granting the requested writ to review a decision of a United States Court of Appeals. These would be the guiding principles in the instant case. However, none of these principles apply. There is no showing how the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with the decision of any other United States Court of Appeals on the same matter. In fact, it is consistent with prior decisions of this Court.

Neither is there any argument from Petitioner that the Tenth Circuit decided a federal question in a way which is in conflict with a state court of last resort. This is so because there are simply no decisions in conflict with the Tenth Circuit on the matters addressed in the instant matter.

Finally, there is no argument from Petitioner, nor can there be, that the decision of the Tenth Circuit somehow "departed from the accepted and usual course of judicial

procedings." Neither can there be any showing that the Tenth Circuit has "sanctioned such a departure by a lower court" since the decision of the United States District Court for the Western District of Oklahoma was proper in all regards. Accordingly, there is no call for this Court to exercise its supervisory powers.

In short, there is nothing which should compel this Court to exercise its judicial discretion and issue the requested Writ of Certiorari. Respondents urge the requested Writ be denied.

II.

SUMMARY JUDGEMENT WAS APPROPRIATE FOR PETITIONER'S CIVIL RIGHTS CLAIM BECAUSE SHE FAILED TO ALLEGE OR IDENTIFY AN UNCONSTITUTIONAL PATTERN OR PRACTICE BY CANTON OR AN OFFICIAL POLICY MAKER.

Petitioner claimed she was deprived of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. Her action was brought, in part, pursuant to 42 U.S.C. §1983. It is therefore crucial to note that she alleges only the single incident of purportedly wrongful activity as a basis for liability against both Canton and Lane. Lane was sued only in his official capacity.

A single act of wrongful activity is insufficient to impose liability against a municipality for a civil rights violation. Municipalities are not liable on an agency basis for the individual wrongs of their employees. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). Instead, a claimant must have been injured by a wrongful act undertaken pursuant to an existing unconstitutional municipal policy or custom. *City of Oklahoma*

City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

In the instant case, there was no allegation that Chief Lane was acting purusant to any policy or custom of Canton at the time he purportedly "misappropriated" Plaintiff's money. Absent such an allegation, there is no claim that Canton has an unconstitutional municipal policy or custom. Without such a claim, Canton cannot be liable under a civil rights theory for the single, allegedly wrongful incident of its employee.

One potential exception to the above-stated rule was recognized by this Court in *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). This Court indicated that in certain limited circumstances a municipality may be liable for a single wrongful act of an official. However, this liability occurs only when the official is "the final policy making authority" so that his or her wrongful acts may be deemed the policy of the city. *Pembauer*, 475 U.S. at pg. 483. The limitation on this potential basis for liability is that the acts must be "acts of the municipality." The municipality must actually sanction or order them. *Pembauer*, 475 U.S. at pg. 480; *Praprotnik*, 108 S.Ct. at pg. 924.

Petitioner argues that Lane, as Chief of Police, had policymaking authority. (Pet.Brief at p. 8) Petitioner apparently claims that this makes Respondent Lane a policy maker so that his actions may be the predicate to impose liability on the Town of Canton. This argument fails for two reasons. First, there was no evidence and no allegation of any unconstitutional policy made by Lane. Even if Lane had the status of policy maker with respect to collecting fines, which was never alleged

or established by inference with any evidence, Petitioner does not identify or allege any unconstitutional policy sufficient to create a basis for liability. As this Court noted in *City of St. Louis v. Praprotnik*, 485, U.S. 126, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988):

> The city cannot be liable under Section 1983 unless respondent proved the existence of an unconstitutional municipal policy. Respondent does not contend that anyone in city government ever promulgated, or even articulated, such a policy. *Praprotnik*, 108 S.Ct. at 926.

Even if an individual involved in the litigation can be deemed a "policy maker" whose actions are sufficient to impose liability on the city, the liability must be based on some unconstitutional policy. In the instant case, Petitioner never alleged or identified any "unconstitutional policy" of Canton's or Lane's and so her claim failed.

The second reason this argument should be rejected is that Chief Lane simply is not a "policy maker" whose actions might be deemed the "policy" of the Town of Canton. In *Praprotnik*, supra, this Court clarified its earlier decision in *Pembaur*, supra. Justice O'Conner, speaking for the Court, identified four necessary elements to establish when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. *Praprotnik*, 108 S.Ct. at 924. Three of the four necessary elements of these "Guiding Principles" for establishing such a claim require that:

> (1) Only municipal officials with final policy making authority may subject the government to Section 1983 liability;
>
> (2) The issue of whether the official has final policy making authority is a question of *state law*; and,

> (3) The challenged action must have been taken pursuant to a policy adopted by the official or the officials responsible under state law for making policy in that area of the city's business. *Proprotnik*, Id., at pg. 294 (citing *Pembaur*, 106 S.Ct. at 1299-1300). (Emphasis in original).

In the instant case, Petitioner failed to allege or produce any evidence that Chief Lane had policy making authority regarding the collection of fines or handling of mail sufficient to show that his actions might bind the city with respect to any policy adopted in these areas. In fact, Chief Lane has *no authority* in these areas. The District Court had before it an excerpt from the Town of Canton's Code of Ordinances. Canton's Ordinances showed that Canton is organized as a statutory town board of trustees town. Under Oklahoma Law – the guiding principal according to this Court in *Pembaur* and *Praprotnik* – all policy making authority in a town such as Canton is left to the town board of trustees. Oklahoma's statutes for this form of government state:

> 11 O.S. § 12-106 Powers vested in board of trustees–designated powers
>
> *All powers* within of a statutory town board of trustees town, *including the determination of matters of policy shall be vested in the board of trustees.* (Emphasis added.)

Oklahoma law gives Canton's Board of Trustees *all* policy making authority. Canton's chief of police has no delegated policy making authority. Without such authority under Oklahoma law, Lane is incapable of establishing an "unconstitutional" policy for purposes of Petitioner's claims.

Moreover, Oklahoma's Government Tort Claims Act, 51 O.S. §151, et seq. (Pet.App. 34-104), states when a municipal employee is acting within the scope of employment. Section 152(9) states:

> "Scope of employment" means performance by an employee acting in good faith within the duties of his office. . . . (Pet.App. 45)

Therefore, for the Town of Canton to be liable for the alleged wrongs of Chief Lane, Lane must have acted "in good faith" in order to have been within the scope of his employment.

Petitioner alleged that Lane wrongfully "misappropriated" money. Respondents submit that such an allegation would take Lane outside the scope of his employment since it is impossible to "misappropriate" money in good faith. Because the allegation takes Lane outside the scope of his employment, Lane could not make policy for Canton in this instance even if he were a "policy maker."

This analysis was earlier employed by the United States Court of Appeals for the Tenth Circuit in *Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991). Its decision in the instant matter was entirely consistent with its earlier precedent construing Oklahoma law.

In *Houston*, supra, the Tenth Circuit considered an appeal from the Eastern District of Oklahoma where the trial court had issued an Order directing a city and excise board to make tax levies to retire a judgment entered in favor of Plaintiff. The city appealed this ruling since it had been previously dismissed from the litigation after a finding that its police officers acted outside the scope of their employment. The officers, however, were found liable. *Houston*, Id., at pg. 889.

The Tenth Circuit ultimately held that the city was not liable for the judgment against the individual police officers since at trial the jury had found the officers responsible for punitive damages. The Tenth Circuit concluded that such a finding indicated the individual officers' actions had amounted to gross negligence and willful and wanton conduct amounting to a reckless disregard of Houston's rights.

> Once the jury found that Defendants Reich and McHam had acted willfully, wantonly and in reckless disregard of Houston's constitutional rights, the city was not liable under the Oklahoma Governmental Tort Claims Act and Reich and McHam forfeited their immunity from liability under the Act. *Houston*, Id. at pg. 890.

Although *Houston*, supra, addressed the issue of a city's liability for torts of its employees under Oklahoma's Governmental Tort Claims Act, 51 O.S. §151, et seq., the principles are applicable here. Because Petitioner alleged that Lane willfully "misappropriated" money and that this was an "intentional constitutional" tort, she claimed Lane acted outside the scope of his employment. Even if Lane were a policy maker (and he is not), Petitioner's own allegations show that he could not have been acting as a policy maker at the time of the purported deprivation because his alleged actions were outside the scope of his employment.

Petitioner failed to allege an unconstitutional policy, practice or custom of the Town of Canton sufficient to state a claim for relief under 42 U.S.C. §1983. Neither was Petitioner able to claim or establish that the actions of Lane are those of a policy maker acting for the city such that a single purported wrongful act might invoke

liability. Under these circumstances, Petitioner's allegations were insufficient to show that Respondent Canton is liable for any unconstitutional deprivation. Accordingly, the Tenth Circuit properly affirmed the District Court's judgment in favor of Respondent Town of Canton. The requested Writ should be denied.

III.

PETITIONER'S CIVIL RIGHTS CLAIM FAILED BECAUSE THE EXISTENCE OF AN ADEQUATE POST-DEPRIVATION TORT REMEDY SHOWS THAT SHE WAS NOT DENIED DUE PROCESS OF LAW.

Because Petitioner has adequate remedies under Oklahoma's Governmental Tort Claims Act for all claimed wrongs, she has suffered no deprivation of due process of law. Absent such a deprivation, her civil rights claim will not lie against either Canton or Lane. Petitioner confessed this argument before the District court. (Pet.App. 20, 30).

In *Hudson v. Palmer*, 486 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), this Court considered an inmate's claim that a prison officer's intentional deprivation of property constituted a violation of due process of law. Palmer was an inmate in Virginia who suffered a "shake down" search by correctional officer Hudson. During the search, the officer went into Palmer's prison cell and allegedly intentionally destroyed certain noncontraband personal property belonging to Palmer. *Hudson*, 104 S.Ct. at pp. 3196-97. The trial court sustained the officer's Motion for Summary Judgment, relying on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (Negligent deprivation of property by state officials does not violate the Fourteenth Amendment if an adequate post-deprivation state remedy exists).

The Court of Appeals affirmed the District Court's finding that Palmer was not deprived of his property without due process of law. It did so by recognizing that although the reasoning of *Parratt v. Taylor*, supra, addressed only negligent deprivations of property, it applied with equal force to alleged unauthorized intentional deprivations. *Hudson*, 104 S.Ct. at pg. 3197; citing *Palmer v. Hudson*, 697 F.2d 1220, 1223 (4th Cir. 1983).

Although this Court in *Hudson*, supra, also addressed a Fourth Amendment issue, it examined whether its decision in *Parratt v. Taylor*, supra, should apply to alleged intentional acts. This Court noted that the underlying rationale of *Parratt*, supra, is that:

> When deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply impracticable since the state cannot know when such deprivations will occur. *Hudson*, 104 S.Ct. at pg. 3203.

Writing for the Court, Chief Justice Burger held that there was "no logical distinction between negligent and intentional deprivations of property insofar as the practicability of affording predeprivation process is concerned." *Hudson*, Id., at pg. 3203.

Even though negligent and intentional acts were to be treated equally, Chief Justice Burger noted that they might still constitute a deprivation of due process of law. However, such acts would only be illegal if the state failed to provide a post deprivation remedy.

> We hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Fourteenth Amendment if a meaningful post-

> deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy. *Hudson*, Id., at pg. 3204.

Next, Chief Justice Burger determined that the Court needed only to decide whether Virginia, where Palmer was incarcerated, provided adequate post-deprivation remedies. Chief Justice Burger found that the Supreme Court had no reason to question the Court of Appeals' implicit determination that Virginia did provide such available remedies.

This Court ruled that no deprivation of property without due process of law occurred. This was because it was impractical for the state to provide pre-deprivation due process when the loss allegedly arose from random, unforeseeable, intentional actions of state employees. Since Palmer had adequate post-deprivation tort remedies there was no loss without due process. He could use state tort theories to remedy any loss.

The allegations in the instant case are logically identical. Oklahoma provides an adequate post-deprivation remedy to Petitioner in this case pursuant its Governmental Tort Claims Act. If Petitioner suffered damages because of an intentional tort by a state employee, she can seek a remedy under the procedure set forth at 51 O.S. §151, et seq.

Because this Court has determined that the availability of adequate state law based tort remedies are sufficient post-deprivation procedures and that intentional torts under such circumstances do not amount to a deprivation of due process of law in violation of the Fourteenth Amendment, Petitioner had no federal claim in this case

against either Respondent. Her claim is identical to that in *Hudson*, supra, and subject to the same infirmities. Therefore, the District Court's judgment was properly affirmed in favor of both Respondents on Petitioner's claim that she had been deprived of property without due process of law.

IV.

THE TENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISCRETIONARY DECISION TO REFUSE SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS FOLLOWING ENTRY OF JUDGMENT ON PETITIONER'S FEDERAL CLAIM.

Petitioner's Complaint clearly invoked the original jurisdiction of the District Court due to an allegation concerning a federal question. The District Court also properly had before it Petitioner's pendant state claim under Oklahoma's Governmental Tort Claims Act pursuant to its supplemental jurisdiction.

However, once the District Court entered judgment in Respondents' favor on the federal claim which gave it original jurisdiction, it had authority to dismiss Petitioner's pendant claims. 28 U.S.C. §1367(C) provides:

> The district courts may decline to exercise supplemental jurisdction over a claim in subsection (a) if:
>
> (3) The district court has dismissed all claims over which it has original jurisdiction. . . .

The original jurisdiction of the District Court was invoked because of the existence of a federal question, pursuant to 28 U.S.C. §1331. (Pet.App. 31). Once it entered judgment in Respondents' favor on the federal claim, 28 U.S.C. §1367(C)(3) no longer required it to exercise supplemental jurisdiction over the pendant state tort claim.

The United States Court of Appeals for the Fifth Circuit recently acknowledged that District Courts enjoy a wide discretion in determining whether to retain supplemental jurisdiction over state claims once all federal claims are dismissed. *Noble v. White*, 996 F.2d 797 (5th Cir. 1993). Many District Courts have refused to retain supplemental jurisdiction of state claims after entering judgment in favor of Defendants on civil rights or discrimination claims. See generally *Landefield v. Marion General Hospital, Inc.*, 994 F.2d 1178 (6th Cir. 1993); *Birmingham v. Sony Corp. of America, Inc.*, 820 F.Supp. 834 (D.N.J. 1992); *White v. Union Pacific R.R.*, 805 F.Supp. 833 (D.Kan. 1992); and *Lahaza v. Azeff*, 790 F.Supp. 88 (E.D.Pa. 1992).

In the instant case, there is no compelling reason for the District Court to have retained Petitioner's state law claim. No discovery had been performed. The case had not been before the District Court for such a period of time that it would have fostered judicial economy to resolve the state claim in the federal forum.

Because judgment was entered at an extremely early pleading stage, the District Court was well within its discretion in dismissing Petitioner's state law claims without prejudice. The Tenth Circuit's decision to affirm the District Court's dismissal without prejudice is consistant with positions adopted by other Circuit Courts of Appeal and certainly does not represent a departure from a usual and accepted course of judicial proceedings.

CONCLUSION

For all of the reasons and arguments set forth above, Respondents Town of Canton and Chief Carl Lane respectfully urge the Court to deny Certiorari in this case.

Respectfully submitted,

DAVID W. KIRK (OBA #11386)
(Counsel of Record)

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Town of Canton and
Chief Carl Lane.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-93-1056-C

GEORGIA MAE ROBERTS,

Plaintiff,

v.

THE TOWN OF CANTON,
A Municipal Corporation, and CARL LANE,
Chief of Police of the Town of Canton,

Defendant.

COMPLAINT

Comes now the Plaintiff Georgia Mae Roberts of Canton, Oklahoma and for her cause of action against the Defendants, alleges and states as follows:

1. This action is brought against the Town of Canton and the individual officer under 42 U.S.C.A. §1983 and the Oklahoma Governmental Tort Claims Act, 51 O.S. §151 et seq., seeking relief for intentional constitutional torts of said Defendant Chief of Police while acting under color of state law.

2. 28 U.S.C.A. §1331 vests federal district courts with original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

3. All administrative procedures for the initial review of tort claims against the Town of Canton have been

satisfied, in that an administrative claim was filed with the Office of the Clerk of the Town of Canton on September 25, 1992, within one (1) year after the claim accrued, and ninety (90) days expired without the Town of Canton approving the claim; therefore this Court has jurisdiction and venue over the subject matter herein.

FACTUAL ALLEGATIONS

4. A citation for speeding was issued to Plaintiff on the 10th day of April, 1992. The fine was paid on the 2nd of May, 1992, with court costs of $22.00 to be paid by the 3rd day of June, 1992, and later extended to the 10th day of July, 1992. Plaintiff mailed the $22.00 on June 28, 1992. However, Plaintiff was notified by the municipal clerk that payment had not been received. Plaintiff was ordered to again pay the $22.00, or she would be found in contempt of court and her driver's licensed would be revoked. On July 24, 1992, Plaintiff personally delivered the payment to the Office of the Canton Municipal Court Clerk along with a letter from her attorney protesting the double assessment.

5. Carl Lane, Chief of Police in Canton, picks up the mail while on patrol. A Canton Post Office employee recalls placing the envelope mailed by Plaintiff in the police department's post office box on June 28, 1992. Although the original payment of court costs was tendered as directed, the funds were misappropriated by Defendant Lane while acting under color of state law, and were never credited to Plaintiff, who was forced to pay the sum a second time, thereby depriving Plaintiff of her property without due process of law in violation of the Fourteenth Amendment of the United States Constitution for which Plaintiff seeks $22.00 for court costs assessed in duplicate, $110,000.00 for mental distress,

$500,000.00 for punitive damages, and for such other and further relief as the Court may deem proper in law or in equity.

SECOND CAUSE OF ACTION

The Plaintiff re-alleges and restates each and every allegation hereto set forth, and adopts the same by this reference thereto; and for further cause of action against the Town of Canton, alleges and states as follows:

6. Plaintiff alleges that the Oklahoma Governmental Tort Claims Act waives the sovereign immunity of the Town of Canton and permits suit for damages for actions or omissions by municipal employees, specifically the individual Defendant herein.

7. The Town of Canton, after being put on notice of the conduct of Defendant Lane, used its judicial power in threatening to hold Plaintiff in contempt of court and revoking her driver's license if she did not again pay the court costs. This action was under color of state law and deprived Plaintiff of her property without due process of law, and in violation of the Fourteenth Amendment of the United States Constitution for which Plaintiff seeks $22.00 for court costs assessed in duplicate, $110,000.00 for mental distress and $500,000 for punitive damages, for attorney fees, and for such other and further relief to which she may be entitled.

WHEREFORE, premises considered, Plaintiff prays judgment against each of the Defendants in the amount of $22.00 for duplicate court costs, $110,000.00 for

mental distress, $500,000.00 for punitive damages, attorney fees, and for such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

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Attorney for Plaintiff

APPENDIX B

11 O.S. §12-106. Powers vested in board of trustees – Designated powers

All powers of a statutory town board of trustees town, including the determination of matters of policy, shall be vested in the board of trustees. Without limitation of the foregoing, the board may:

1. Appoint and remove, and confirm appointments of, designated town officers and employees as provided by law or ordinance;

2. Enact municipal legislation subject to limitations as may now or hereafter be imposed by the Oklahoma Constitution and law;

3. Raise revenue, establish rates for services and taxes, make appropriations, regulate salaries and wages and all other fiscal affairs of the town, subject to limitations as may now or hereafter be imposed by the Oklahoma Constitution and law;

4. Inspect the books and accounts maintained by the town treasurer;

5. Inquire into the conduct of any office, department or agency of the town, and investigate municipal affairs, or authorize and provide for such inquiries;

6. Create, change and abolish offices, departments or agencies other than those established by law; assign additional functions and duties to offices, departments and agencies established by this article and define the duties, powers and privileges of all officers which are not defined by this article; and

7. Grant pardons for violation of municipal ordinances, including the remission of fines and costs.

Laws 1977, c. 256, §12-106, eff. July 1, 1978.